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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Peter Iannecelli

Proc. I

FILE: B-190241

DATE: March 3, 1978

MATTER OF: What-Mac Contractors, Inc.

DIGEST:

1. Air Force properly canceled solicitation involving conversion of in-house base operating support function to commercial contract where enactment of Department of Defense Appropriation Act, 1978, containing prohibition on use of appropriated funds for such purposes, was imminent.

2. Claim for proposal preparation costs is denied where there is no evidence of arbitrary or capricious action toward claimant by Air Force in canceling RFP.

Request for proposals (RFP) No. F41699-77-09005 was issued by the Department of the Air Force on February 1, 1977, for the procurement of services involved in the management and operation of the fuels distribution system at Kelly Air Force Base, Texas. By letter dated September 20, 1977, What-Mac Contractors, Inc. (What-Mac), protested the cancellation of the solicitation on or about September 16, 1977, by the Air Force. What-Mac alleged that the cancellation of the solicitation was the result of arbitrary, capricious and unreasonable action by the Air Force and requested that our Office direct the Air Force to make an award under the solicitation. In the alternative, What-Mac claimed reimbursement of its proposal preparation costs.

The initial report of the Air Force to this Office on November 11, 1977, stated that the solicitation involved conversion of base operating support effort currently performed by Government personnel to performance by contractor personnel. The Air Force indicated that on September 9, 1977, in anticipation of the passage of the Department of Defense Appropriation Act, 1978, which contains prohibitions against further conversion of in-house base operating support (BOS) functions to commercial contract, Air Force Headquarters notified all field activities that no new BOS contracts were to be awarded and that all

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outstanding BOS solicitations were to be canceled. The solicitation was, therefore, canceled by the contracting activity.

Subsequently, on September 21, 1977, the Department of Defense Appropriation Act, 1978, Public Law 95-111, 91 Stat. 886, 908, was enacted. The Air Force contended that, although the cancellation preceded passage of the Act, such action was necessary in view of its imminent enactment in order to conform to the intent of Congress. The Air Force cited section 852(a) of the Act as the applicable provision in support of canceling the procurement. Section 852(a) provides:

"(a) None of the funds appropriated by this Act may be used to (1) convert base operating support functions, excluding real property maintenance and repair, to commercial contract during the period October 1, 1977, through September 30, 1978, or (2) to fund continued performance during fiscal year 1978 of base operating support contracts, excluding real property maintenance and repair, awarded between the date of enactment of this Act and September 30, 1977, which convert base operating support activities performed by employees of the Government of the United States to commercial contract."

The protester cites section 852(b) of the Act as the provision of law applicable to the present solicitation. Section 852(b) provides:

"(b) None of the funds appropriated by this Act may be obligated for commercial contracts to be physically performed at an installation or facility including leased facilities for the following types of work: (1) weapons system engineering and logistical support; (2) ship, aircraft, missile, automotive and tracked vehicle intermediate level maintenance or depot maintenance; or (3) research, development, test, and evaluation, if the work to be physically performed at an installation or facility during fiscal year 1978 by commercial contracts would result in a

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reduction of employees of the Government of the United States at that installation or facility."

What-Mac argued that the Air Force had not shown that award of the contract would cause a reduction of employees of the Government at the installation or facility so as to be prohibited by section 852(b). Thus, the protester maintained that cancellation of the procurement was improper. Moreover, What-Mac argued that Air Force Headquarters issued guidance to all field activities indicating that the restriction contained in section 852(b) would only be applied in high unemployment areas.

On January 5, 1978, the Air Force supplemented its report on the subject protest. What-Mac has asserted that the Air Force's supplemental report is untimely and should not be considered by our Office in accordance with section 20.3(e) of our Bid Protest Procedures. 4 C.F.R. Part 20 (1977). We point out that the Air Force's supplemental report was submitted in response to our request, in accordance with section 20.6 of our Bid Protest Procedures and, therefore, has been considered by our Office; What-Mac has had an opportunity to comment upon the supplemental report.

In the supplemental report the Air Force has again expressed the view that the canceled solicitation was within the purview of the prohibition contained in section 852(a) of the Act. In this regard, the Air Force stated:

"* * * With regard to his initial argument, the protestor has apparently either misinterpreted the intent of the restrictions included in the Act or has failed to consider the nature of the effort envisioned in this procurement. As mentioned in our initial report, the solicitation in question sought offers for the management and operation of the Kelly AFB Fuels Distribution Systems, efforts obviously categorized as Base Operating Support. These efforts are indirect support of the normal performance of the day-to-day functions of the Air Force Base. They involve those actions which are incidental to providing base-wide fuels servicing and support to those organizational activities

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located on Kelly AFB. The work to be performed does not relate solely to any specific organization, weapons system, or functional area and is required in support of the normal operation of the base itself. These efforts clearly do not fall within the restrictions outlined in Section 852(b) of the Act, since they are neither weapons systems engineering or logistics support, intermediate or depot level maintenance, or research, development, test, or evaluation."

This statement has not been refuted by the protester nor has the protester shown any evidence that the canceled solicitation fell within the purview of section 852(b) rather than section 852(a) of the Act. Accordingly, the protester's arguments based upon guidance issued by Air Force Headquarters to all field activities under section 852(b) of the Act are not relevant.

Since the procurement involved conversion of BOS functions from Government to contractor personnel, the use of fiscal year 1978 appropriated funds to continue performance under the contract, if awarded between enactment of the Act and September 30, 1977, would be prohibited under section 852(a)(2). In this regard, we have held that an agency determination that funds are not available for contract obligation is sufficient justification for canceling a solicitation. Cf. TIMCO, B-186177, September 14, 1976, 76-2 CPD 242. Moreover, it appears that the contract would have been in violation of the provisions of section 852(a)(1) of the Act if it were awarded after September 30, 1977. In such case, the Air Force would have no choice but to cancel the solicitation. See Vanport Manufacturing Company, B-186559, October 19, 1976, 76-2 CPD 343.

Regarding What-Mac's claim for an unspecified amount for proposal preparation costs, the courts and our Office have allowed recovery of bid or proposal preparation costs where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Condur Aerospace Corporation--Claim for Proposal Preparation Costs, B-187347, July 14, 1977, 77-2 CPD 24; National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192. We have examined the record in the matter, and we find no evidence that the

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Air Force acted arbitrarily or capriciously toward What-Mac. To the contrary, we find rational support for the Air Force's decision to cancel the solicitation in view of the fact that passage of the Department of Defense Appropriation Act, 1978, prohibiting the use of appropriated funds for such contracts, was imminent.

Accordingly, the protest and the claim for proposal preparation costs are denied.

Deputy

R. K. Miller
Comptroller General
of the United States